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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1370

LAKESIDE HOSPITAL ASSOCIATION; JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY; RESEARCH HOSPITAL AND MEDICAL CENTER; KANSAS CITY COLLEGE OF OSTEOPATHIC MEDICINE; NORTHEAST OSTEOPATHIC HOSPITAL; SISTERS OF SAINT MARY (Owning and Operating St. Mary's Hospital); KANSAS CITY GENERAL HOSPITAL AND MEDICAL CENTER; CHILDREN'S MERCY HOSPITAL,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY; JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI; ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI; KANSAS CITY LUTHERAN HOME AND HOSPITAL ASSOCIATION; BAPTIST MEMORIAL HOSPITAL and INDEPENDENCE SANITARIUM AND HOSPITAL; and MARY ELIZABETH BLETHROADE SUTT, ELIZABETH MAY JACKSON, CAREY McWILLIAMS and CASLEY McWILLIAMS, Known Heirs, and the Unknown Heirs of Homer McWilliams, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Missouri in the case of *The First National Bank of Kansas City* v. *John C. Danforth, Attorney General of Missouri, et al.*

OPINION BELOW

The Opinion and judgment of the Supreme Court of Missouri, ... S.W.2d ....., as yet unreported, appears in Appendix A, *infra*, pages A1-A31. The Opinion and judgment of the Circuit Court of Jackson County, Missouri, is unreported and appears, so far as material, in Appendix B, *infra*, pages A32-A44.

The judgment of the Supreme Court of Missouri sought to be reviewed was entered on January 13, 1975.

Petitioners' motions for rehearing, or in the alternative for transfer to the Missouri Supreme Court, en banc, were overruled on February 10, 1975.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sec. 1257(3), in that petitioners and other defendants have asserted below and are asserting here deprivation of rights, privileges and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE ISSUES PRESENTED

Whether the decree of the Supreme Court of Missouri in this cause, affirming the judgment of the Circuit Court for the Sixteenth Judicial Circuit of Missouri in a special action to construe the language of a will and codicil establishing a tax-exempted, perpetual public charitable trust, the execution of which is by law to be supervised and enforced by the defendant Attorney General of Missouri through action in the Courts of that State, contravenes the Establishment and Equal Protection Clauses of the

First and Fourteenth Amendments to the Constitution of the United States, in that the decree:

(a) mandates the trustee thereof, a National Banking Association, to limit disbursements to the recipients of sums held in trust to (i) four "Protestant Christian" hospitals, selected by the trial court's decree from among all public non-profit hospitals within Jackson County, as "having a special relationship to and at least some measure of control by a Protestant Christian Church, and/or" (ii) to patients in said four hospitals who were "born of white parents in the United States of America";

and further

(b) thereby excludes from the benefits of the said public charitable trust (i) the nineteen other state-licensed, public non-profit hospitals serving the citizens of the county; (ii) all patients of such excluded hospitals who are not native born and caucasian; and (iii) subject to the trustee's discretion, approved in advance, all non-white, non-native patients of the four hospitals selected.

CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Constitutional Amendments are found in the West Publishing Company's United States Code Annotated. The First Amendment is found on page 19 of the first Volume on Amendments and is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment is found on page 4 of Volume on Amendments "14 to End" and Section one is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This suit arises on a petition brought by The First National Bank of Kansas City as executor of the Estate of Homer McWilliams and trustee of the public charitable trust established by the decedent's will, seeking construction by the courts of certain language in the will and a codicil thereto, and instructions regarding administration of the trust (5 T. 46). The facts of the case are not disputed.

Article XV of the Last Will and Testament of Homer McWilliams, which created the "McWilliams Memorial Hospital Trust", provides in pertinent part that the net income from the trust is to be used annually by the trustee:

> ". . . in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a nonprofit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America." (5 T. 37)

The codicil also provided for preservation and/or restoration of the corpus of the trust in order that it might have perpetual existence:

> "Since it is my desire that the corpus of the Trust shall be at all events and under all conditions and circumstances maintained and preserved at not less than its original value, I direct that the Trustees shall so distribute and expend the Annual net income of said Trust Estate, only after making all conservative replacements and allowances for loss, depreciation, deterioration, and for the shrinkage in value of the principal of the Trust." (5 T. 38)

Homer McWilliams died on December 21, 1965, at the age of 98 (T. 604-606, 5 T. 33). His will, executed November 16, 1934 (5 T. 33), together with a first codicil executed on March 20, 1946 (5 T. 41) provided that the bulk of his $8,485,891.22 (as of December 21, 1965) estate was to be held in a public charitable trust on the foregoing terms (5 T. 139). The corpus of the trust had increased to $11,392,703 by the date of trial (App. A2).

The individual bequests satisfied before the residuary passed over into charitable trust free of taxes were so minimal that only $205.55 were paid in federal estate taxes (T. 34).

On May 21, 1969, the trustee, a national banking association, filed a petition in the Circuit Court of Missouri for the Sixteenth Judicial Circuit, requesting a construction of the instruments (5 T. 2). Only Count V of the trustee's First Amended Petition is relevant here. In that count the trustee alleged that it was unable to ascertain with certainty the meaning of Article XV and asked the trial court to construe the trust and to designate those hospitals and patients which qualified as beneficiaries (5 T. 12-

14). The trustee named as defendants all 23 licensed hospitals believed by the trustee to be located within Jackson County, Missouri, known and unknown heirs of the testator, and the Attorney General of Missouri, an indispensable party to such an action by reason of his official duty to represent the interest of present and future members of the public as beneficiaries of all charitable trusts [5 T. 2-5; see *Dickey* v. *Volker*, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (en banc 1928)].

Each of the petitioning and respondent hospitals answered, alleging that it qualified as a beneficiary of the McWilliams Memorial Hospital Trust, that it provided hospital services to the public at large and to deserving poor and unfortunate persons, without regard to race, creed or nationality (5 T. 66-100, 104-111, 118-127).

Four hospitals alleged that they were Protestant Christian institutions (5 T. 43, 49, 91, 111). The petitioning hospitals alleged that compliance with the religious and racial restrictions of the trust would be unlawful and contrary to the First and Fourteenth Amendments to the Constitution of the United States, and that therefore the doctrine of *cy pres* or deviation should be applied to realize the testator's general charitable intent by qualifying all non-profit private hospitals in Jackson County as beneficiaries (5 T. 66-90, 97-101, 104-110, 118-125). The petitioning hospitals reiterated their position at trial and in post-trial briefs (T. 368-70, 584-85; 5 T. 133-34, 5 T. 161-66).

The defendant Attorney General also took the position that the religious and racial covenants contravened the federal and Missouri Constitutions, and asked application of the *cy pres* doctrine to strike them.

At trial the court admitted "expert" testimony from the President and Dean of the Missouri School of Religion

at Columbia, Missouri and a professor of historical theology at St. Paul's School of Theology in Kansas City, Missouri with respect to the meanings of the terms "Protestant", "Christian", and "Protestant Christian institution" (T. 53-63; 64-66; 68-71; 85-86; 95; 102, 103, 105, 132-133; 135; 195-198; 203, 204, 247-248; 252, 465-466; 782, 783). The Circuit Court for the Sixteenth Judicial Circuit of Missouri, the Honorable James C. Moore, Judge, entered Findings of Fact, Conclusions of Law and Judgment on October 10, 1973, finding and concluding in pertinent part:

> "(b) That it was the intention of Homer McWilliams, as evidenced by his use of the words 'Protestant Christian Hospitals' in describing the hospital beneficiaries of the McWilliams Memorial Hospital Trust in his Last Will and Testament and the First Codicil thereto, that only such hospitals as have a special relationship to and at least some measure of control by a Protestant Christian church, and patients in such hospitals born of white parents were to be selected by his Trustee as beneficiaries of said trust."
>
> "(c) That the Baptist Memorial Hospital, Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all have a special relationship with and are at least partially controlled by a Protestant Christian church and are therefore qualified for selection by the Trustee as beneficiaries of the trust." (App. A40).

The trial court also concluded:

> "(f) . . . that the selection of beneficiaries of the trust according to the provisions of the Will of Homer McWilliams will not result in unlawful discrimination based on race or religion." (App. A40).

Petitioners are 8 of the Jackson County hospitals excluded as beneficiaries by the judgment.

Uncontroverted evidence presented by the petitioners showed each to be a tax exempt (T. 322, 352, 371, 393, 589, 641-42, 647, 664-65) nonprofit corporation (T. 322, 350, 371, 389-392, 587-88, 643, 646, 662), located within Jackson County, Missouri (T. 322, 353, 371, 392, 586, 640, 646, 661) and licensed under the Missouri Hospital Licensing Law (T. 330-331, 359, 373, 393, 588, 642, 649, 663). All have been incorporated by Pro Forma Decree or under the Missouri Not-For-Profit Corporation Act (T. 320-321, 350, 371-372, 389-391, 587, 641, 647, 662). Of the petitioners none has any affiliation or connection with any organized church (T. 340, 354, 374, 393, 642, 646-647, 670), except St. Mary's Hospital which is operated by the Sisters of St. Mary (T. 591), a Roman Catholic order (T. 595). These petitioners all admit substantial numbers of charity patients (T. 322-323, 326-327, 372, 394-395, 593, 643-644, 648, 651, 665-666). None discriminates among its patients, employees, or medical or administrative staff on the basis of race or religion (T. 323-324, 330-331, 354-355, 371, 373-374, 393, 592-593, 642, 646-647, 649, 667).

Further uncontroverted evidence revealed that these petitioners are qualified to receive, and do receive, governmental Medicare and Medicaid payments (T. 328-329, 355, 395, 594, 642, 667). They also received substantial federal funds under the Hill-Burton, Federal Manpower, and other Acts (T. 399, 596, 652, 668).

The evidence adduced at trial indicated that respondent hospitals' organization and operations are similar to those of petitioners. Each respondent hospital is a tax exempt (T. 274, 486, 619, 715-716) nonprofit corporation (T. 270, 482, 502, 606, 716, 734) licensed under the Missouri Hospital Licensing Law (T. 266, 480, 612, 711) and located

within Jackson County, Missouri (T. 264, 475, 612, 711, 734). Respondent hospitals all admit substantial numbers of charity patients (T. 279-280, 487-489, 616, 735-738). None discriminates on the basis of race or religion among its patients, employees, or medical or administrative staff (T. 283, 484, 613, 734-735). All were originally incorporated in Missouri by Pro Forma Decree (T. 267, 479, 606, 712-713). Their assets are owned by the individual corporate bodies, not by any organized church or religious group (T. 501, 609, 730).

Like petitioners, all four respondent hospitals receive governmental Medicare-Medicaid monies (T. 281-282, 499, 749). The administrators for three of respondent hospitals testified that their organizations had received federal monies under such programs as the Health Manpower Act of 1965 and the Hill-Burton Act (T. 499, 616, 748-749). The administrator for respondent Baptist Memorial Hospital testified that the federal funds received by his hospital were limited to Medicare-Medicaid funds for services rendered (T. 281-282).

The decision of which review is sought arose on appeals by the petitioners, the known and unknown heirs, and by the Attorney General. The Supreme Court of Missouri affirmed the judgment below in its entirety by observing that

> "There are two identifiable classes of beneficiaries designated by Mr. McWilliams to which his trustee, in its discretion, is empowered to distribute the income from his trust estate. First is the class of nonprofit Protestant Christian Hospitals located in Jackson County, Missouri; second is the class of sick and infirm patients in said hospitals, born of white parents in the United States of America.

"The designation of the first class is unambiguous and is determinable irrespective of the expert testimony of Dr. Ordway and Dr. Bangs which is consistent with and supports such determination." (App. A14).

". . . respondents concede that racial discrimination will result from the selection of only white patients as one class of beneficiaries of this trust; however, it is at most arguable whether racial discrimination will result *per se* from selection of only 'Protestant Christian hospitals' as the other class of beneficiaries of this trust. * * *

". . . even if it be assumed that racial or religious discrimination, or both, be present, such discrimination in the administration of this trust is not illegal under the Fourteenth Amendment because 'state action' is not involved." (App. A20).

The decision of the Supreme Court of Missouri was entered on January 13, 1975. Motions for rehearing or in the alternative to transfer the cause to the Court en Banc, filed by petitioners, the Attorney General, and the known and unknown heirs, were overruled on February 10, 1975 (App. A45-A46).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Federal Constitutional questions raised under the First and Fourteenth Amendments to the Constitution by petitioners and others were expressly considered and decided by the trial court (App. B, A40-A41), and by the Missouri Supreme Court (App. A, A4, A9-A12, A17-A25).

The questions of encroachment upon the Establishment, Free Exercise, and Equal Protection Clauses under

the Fourteenth Amendment were raised by the answers of the Attorney General (5 T. 46, par. 12) and the known and unknown heirs (5 T. 63, 102-103, 115-116, 129-132), and various of the petitioning and respondent hospitals (5 T. 69, 70, 76, 80, 81, 85, 86, 89, 95 and 108).

All parties addressed the Constitutional issues presented here in their printed briefs before the Supreme Court of Missouri.

Petitioners and the known and unknown heirs also moved for rehearing and/or transfer to the Court en Banc, in part on grounds that the decision conflicts with decisions of this Court construing the Establishment, Free Exercise and Equal Protection Clauses. The Missouri Attorney General moved separately for rehearing, or in the alternative for transfer to the Court en Banc, on the ground that the decision contravenes the Equal Protection Clause.

REASONS FOR GRANTING THE WRIT

I. The Judgment Below Both Contravenes Major Decisions of This Court by Lending Judicial Approval and Enforcement to Privately Initiated Religious and Racial Discrimination in Funding a Public Function, and Demonstrates the Need for a Definite Ruling by This Court on the Question of State Action in the Context of Official Support for and Supervision of Public Charitable Trusts.

The judgment of the Supreme Court of Missouri, of which review is sought, presents the questions of racial and religious discrimination by the instrumentalities of government in the peculiarly compelling dual contexts of State encouragement and oversight of the administration of public charitable trusts, and of governmentally subsi-

dized and scrutinized delivery of health care. The judgment below approved a Circuit Court decree, in an action for construction of a will and codicil, which required the national bank acting as trustee of a public charitable trust to restrict its benefits to the four of nineteen state-licensed hospitals in Jackson County, Missouri which the Circuit Court had found to bear "a special relationship to" or to be under "at least some measure of control by" a "Protestant Christian Church", and/or to patients in "said hospitals" who were "born of white parents in the United States of America."

The decision of the Supreme Court of Missouri sharply defines the issues presented, in that it clearly acknowledges that the limitations found to have been intended by the testator constituted discrimination on the basis of religion and race which almost certainly would be forbidden to State or federal government by the Establishment of Religion and Equal Protection Clauses, under this Court's decisions in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia*, 357 U.S. 570 (1958); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The Supreme Court of Missouri affirmed the judgment against the State Attorney General, the petitioning Jackson County hospitals and known and unknown heirs of the settlor, on the narrow, explicit grounds that there was no "state action" or undue governmental entanglement (1) in the form of affirmative judicial action (notwithstanding the Circuit Court's having designated the eligible beneficiary hospitals from among the twenty-three defendant institutions, retained "supervisory jurisdiction" over administration of the trusts, and required annual accounting to the Court by the trustee); (2) in the tax-exempted, perpetual, and publicly supervised character of

a public charitable trust (notwithstanding the various governments having deferred taxation of the testator's $8.4 million estate except to the extent of $205.55, the circumstances that the action was necessarily brought against the Attorney General, and the election of the Circuit Court not to apply the doctrines of *cy pres* and deviation peculiarly applicable to such trusts); (3) by reason of the federally-chartered and state-licensed character of the trustee (notwithstanding the legislative grant of the trust powers being exercised); (4) by reason of the licensed, regulated, subsidized and basic public character of the health care function performed by the defendant public and private hospitals vying for the benefits; or (5) to be found by "sifting the facts and weighing the circumstances" of all levels and stages of effecting, construing, superintending, disbursing, and utilizing the trust benefits.

In the 1957 *Girard College* case, *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230, this Court rejected *per curiam* the contention that the trustees of a public charitable trust, vintage 1831, could apply the trust proceeds to sustain racial discrimination in a "private" school for orphans. However, the matter was presented in the confining context of administration by a Board of Directors of City Trusts established by an 1869 Pennsylvania statute; thus, the issue of state action was readily resolved by the finding that the Board was "an agency of the State of Pennsylvania . . . even though the Board was acting as trustee" for the desires of Stephen Girard, the settlor.

The scope of the decision was implicitly broadened in the course of subsequent developments. On remand, the Orphans Court of Philadelphia County removed the Board of Trustees as having been "disqualified" by this Court's decision, and, in the exercise of ordinary equitable

powers over public charitable trusts, substituted thirteen private citizens to oversee continued whites-only administration of the trust, in accordance with the testator's expressed intent. The Orphans Court declined the alternative course, to strike the restriction to "white" children under the doctrines of *cy pres* or deviation, although the City of Philadelphia and the Commonwealth of Pennsylvania had joined the original plaintiffs to seek such relief. The Supreme Court of Pennsylvania affirmed, *In re Girard College Trusteeship*, 138 A.2d 844 (1958), *appeal dism'd and cert. denied, sub nom. Commonwealth of Pennsylvania* v. *Board of Directors of City Trusts*, 357 U.S. 570 (1958).

After *Evans* v. *Newton*, 382 U.S. 296 (1966), had determined that judicial substitution of private trustees for public ones can constitute the continuation of state action rather than avoidance of it, the City, the Commonwealth, the State Attorney General and subsequent non-white applicants for admission to Girard College successfully brought a new action in the federal courts to have the racial restriction voided. *Commonwealth* v. *Brown*, 270 F.Supp. 782 (E.D.Pa. 1967), *aff'd* 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968). However, because of the historical connection of Girard College to the City of Philadelphia (whose mayor and aldermen were the trustees originally named by Stephen Girard), and the parallel between the Orphans Court's response to the remand and the action of the Georgia courts in *Evans* v. *Newton*, the Girard College cases did not require a separate ruling on the level of State entanglement in public charitable trusts generally.

Nor can it be said, in the light of the conclusion reached by Missouri's highest tribunal, that this Court's declarations, in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), *Barrows* v. *Jackson*, 346 U.S. 249 (1953), and *Reitman*

v. *Mulkey*, 387 U.S. 369 (1967), that the judicial power may not be applied directly or indirectly to authorize, enforce or unduly encourage private discrimination on grounds in which the State itself might not indulge, have been sufficient to resolve the problem. At least in the opinion of the Supreme Court of Missouri, these decisions did not reach the issue presented here, where the judicial encouragement of discrimination purports to be limited to construing the language of the McWilliams will and codicil, and does not *specifically* enjoin the trustees to effectuate the testator's personal ethnic and sectarian prejudices.

The instant cause presents issues perhaps most like those in *Burton v. Wilmington Parking Authority, supra*, in that no single fragment of the structure of state action may be decisive in itself, making it necessary to develop a perspective of the structure as an integrated whole. It is from that perspective, "[o]nly by sifting facts and weighing circumstances [that] the nonobvious involvement of the State in private conduct [can] be attributed its true significance", 365 U.S. at 723. Here its true significance is that a broad array of federal and Missouri powers, officials and benefits have been devoted to cause and effectuate racial and religious discrimination in an important public function. It is the very nonobviousness of the process thus seen that calls for the writ to be granted.

II. The Judgment Below Entangles Agencies of the State Excessively and Perpetually in Matters of Religion in a Manner Which Causes the State to Discriminate Among Its Citizens on the Impermissible Basis of Religious Affiliation.

The instant cause shows a need for guidance by this Court with regard to religious discrimination in perfor-

mance of a public function. Each of the leading decisions discussed under the first Reason for Granting the Writ arose in connection with explicit or implicit discrimination on the clearly invidious basis of race. In contrast, the decree affirmed here purports to sidestep that issue by finding that McWilliams' desires may be effected by merely sectarian restrictions. Discrimination on such grounds has been much less endemic in at least the recent history of this society and thus is not the subject of definitive decisions.

Nonetheless, although the problem is more rare and the tests of propriety are more subtle, excessive governmental "entanglement" in matters of religion is no less at odds with the Establishment and Free Exercise Clauses than state entanglement in invidious discrimination on grounds of "race" is with the Equal Protection Clause. Compare, *Lemon* v. *Kurtzman*, 403 U.S. 609 (1971), with *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). While the society may take pride in the circumstance that its courts normally have been called upon only to preserve the separation between secular authority and religion *qua* religion, rather than to defend against affiliation between state and a particular religious establishment, the judgment of which review is sought demonstrates that a greater mischief may still arise: The Supreme Court of Missouri has enmeshed the State in favoring one category of church establishment ("Protestant Christian") over others. The decision explicitly denies funds to "Roman Catholic" and "Orthodox" institutions. Implicitly, it favors those of protestant Christianity over Jewish and all other non-Christian, and/or secular institutions.

The decisions of this Court show that, just as the State must be even-handed among the classes of its citizens in order to afford equal protection, it must maintain "a

benevolent neutrality" between religion and secularism, and among doctrinal groups, in order to escape the diametric evils of Establishment and interference with Free Exercise. What is forbidden is "sponsorship, financial support, and active involvement of the sovereign in religious activity". *Walz* v. *Tax Commission*, 397 U.S. 664, 668, 689 (1970); *Lemon* v. *Kurtzman, supra*, at 612; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772 (1972).

The Court has enunciated a three-part test for laws which involve the State in religion: to be valid, a governmental program must (1) have a valid secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *Committee* v. *Nyquist, supra*, at 772-773.

For each fragment in the quilt of State involvement with the McWilliams trust, there is no doubt a secular purpose, and the primary effect of each, from tax exemption for charitable trusts to Hill-Burton grants to hospitals, is in areas other than the religious. But the judgment below presents a substantial Constitutional problem arising from the extraordinary degree to which it entangles the courts and the various other affected instrumentalties of Missouri with issues and organs of religion.

The picture presented contrasts sharply with that in *Walz*, where the action by the State was the traditional exemption from *ad valorem* property taxation of real estate devoted to various not-for-profit enterprises of a charitable, scientific, literary, hospital, educational, patriotic or other specified nature, including houses of worship of any denomination or faith. The express basis for the decision approving such exemption was that the only alternative, nonexemption, "would tend to expand the involvement of government by giving rise to tax valuation of church prop-

erty, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." 397 U.S. at 674.

If, as the Supreme Court of Missouri has ruled, the courts of the State, on application by the Attorney General, the trustee, known and unknown heirs, and/or aspirant beneficiaries, must construe and effectuate specific religious clauses in charitable bequests, and if the state and federally-chartered banks which are the trustees customarily chosen for such trusts by reason of institutional immortality commensurate with that conferred on public charitable trusts, must honor such religiously discriminatory provisions, subject to continuing oversight by the Attorney General and continuing jurisdiction by the courts, the State will be ensnared, not merely entangled.

The present case also presents a simple solution to the Constitutional quandary: the application of the doctrines of *cy pres* or deviation to remove the discriminatory limitations and work the underlying charitable intent of the testator, as prayed by the Attorney General and the petitioning hospitals. Compare *Evans* v. *Abney*, 396 U.S. 435, 445-447 (1970) [*cy pres* inapplicable because no general charitable intent found], with *Wachovia Bank and Trust Company* v. *Buchanan*, 346 F.Supp. 665 (D.C.D.C. 1972) [*cy pres* applied to remove racial restriction from scholarship trust, on evidence of dominant charitable intent]. For the courts to strike the offending limitations in order to realize the testator's charitable purpose in the closest lawful manner, or to strike them as constitutionally impermissible as was done in the final *Girard College* case, clearly would be to minimize governmental involvement by eliminating the prospect of the "confrontations and conflicts" inhering in the legal processes set in motion by the decree below, while preserving the recognized social benefits of private philanthropy.

In opposition to the course of minimizing State involvement with the personal predilections of the testator, the Missouri Supreme Court has elected to engage the State in "[a] comprehensive, discriminating and continuing state surveillance" like that condemned in *Lemon* v. *Kurtzman, supra*, at 619. See, also, *Committee* v. *Nyquist, supra*, at 794. The difference between the course directed here and that in *Lemon* merely aggravates the problem: Whereas the surveillance in *Lemon* was "prophylactic" in purpose, to assure that denominational school teachers receiving state salary supplements did *not* inculcate religion, the involvement thrust upon Missouri agencies—both the Attorney General in the normal course of his duties and the trial court in the exercise of the jurisdiction it expressly retained—is in large part to see that the trustee does not depart from its mandate to disburse trust funds only to "Protestant Christian hospitals" and/or to native born, white patients in such hospitals.

III. Certiorari Should Be Granted Because the Issues Are Clearly Presented Here in the Context of Two Socially Significant Philanthropic Institutions: Perpetual Public Charitable Trusts or Foundations and Privately Owned, Governmentally Subsidized Hospitals Open to the Public.

The judgment below not only presents the questions on which review is sought in the unambiguous manner discussed hereinabove, but also presents them in a socially important context. The will and codicil held below to create a public charitable trust devoted more than eight million dollars to philanthropic support of the delivery of health care to the public, under terms requiring income to be first applied to restoration of any loss or depreciation in principal, in order that the trust should have perpetual life. It created in effect a relatively modest but not insub-

stantial charitable foundation, typical of a burgeoning number of such institutions encouraged by the tax laws and controlling sums measurable only in the tens of billions of dollars. Even a quarter of a century ago, the amounts held by such foundations were increasing at the rate of nearly four billion dollars each year. Andrews, *Philanthropic Giving* 74 (1950).

If at one time the care of the ill, the disadvantaged and the aged was more the preserve of such private philanthropy, not incidentally often routed through religious bodies, than that of government, the undertaking of such responsibilities by governmental bodies in more recent decades has supplemented and not replaced the role of private benefice, creating partnership of the tax-supported and the tax-exempted contributions to major areas of public welfare.

For example, only two of the 23 hospitals in Jackson County, Missouri named defendants as potential beneficiaries of the McWilliams grant are primarily governmental entities. The bulk of the hospital capacity in the county appears still to lie within the realm of private philanthropy.

The laws of the nation place public support on each side of the equation. Federal, State and local governments create, endow and support "public" hospitals, but they also subsidize and largely regulate those which are or were originally the fruit of private philanthropy. "Medicare", "Medicaid", the Hill-Burton program, and the recent government assumption of the cost of artificial kidney treatment are highly visible examples of direct support for health care wherever rendered. The exemption from real property taxes for charitable enterprises generally and hospital premises in particular, together with the exemption of charitable bequests from federal and state estate

and inheritance taxes and the deductions from personal taxes for charitable contributions (e.g., §§170, 501, 2055 of the Internal Revenue Code of 1954, §§145.090, 145.100, 137.100, 143.120, V.A.M.S.; Art. 10, §6 of the Missouri Constitution) are representative of what may be the greater, submerged part of the iceberg.

Inherent in the governmental support is involvement in the intricate web of governmental regulation, ranging in subject matter from the prohibition of racial discrimination in federally funded activities (42 U.S.C. §§201-291.01) to the record-keeping procedures requisite to collecting for services under Medicare.

Also peculiarly apposite here is the unique status given public charitable trusts whereby they are exempt from the Rule Against Perpetuities and subject to oversight in the public interest by the Missouri Attorney General. See, e.g. *Thatcher* v. *City of St. Louis*, 122 S.W.2d 915 (Mo.Sup., Div. 1, 1938); *Dickey* v. *Volker*, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (en Banc 1928); Bogert, *Trusts and Trustees*, §411; 4 Scott, *Trusts*, §381 (2d Ed. 1958); Restatement (Second) of Trusts, §365.

This case presents a portentous paradox: The incidents of favorable treatment of the institutions of private philanthropy by state law in order to encourage their contribution to a public function have given rise to a result which would be wholly impermissible if accomplished through direct governmental support of the identical function. The trial court acknowledged that the McWilliams will "might well have furnished a charter for the Ku Klux Klan," expressing as it did "[e]very prevalent prejudice of the era in which it was written. . . ." It felt compelled to give effect to the prejudices, although by so doing the court effected a perpetual dedication of more than $8 million to racial and religious discrimination.

If such a result were permissible, the laws devised to facilitate the annual commitment of billions of philanthropic dollars to public purposes could come to immortalize the grip of the dead hand of past prejudice and idiosyncrasy on much of the national wealth available for public purposes.

If the judgment below were allowed to stand, what in 1933 or 1946 was merely the personal prejudice of a wealthy man will have become a deathless creature of the laws, once reluctantly ratified by the courts of Missouri, long a precedent licensing similar devises, and forever encumbering a part of the common weal.

Equally important is what is *not* presented by this case. The peculiar involvement of state agencies with public charitable trusts distinguishes the issues here from those which might arise in connection with a simple charitable bequest or a private, *inter vivos* trust. Although Missouri exempts a charitable bequest from inheritance tax, State involvement ends with the executor's settlement. The testator's purpose is the only cause of any selection by race or religion done by the will. By statute, the courts in simple probate matters limit their function to effectuation of the testator's intent. §474.430, V.A.M.S. An *inter vivos* trust may equally discriminate according to the Settlor's personal predilections, and the State has no occasion to intervene during the limited term of a trust subject to the Rule Against Perpetuities, except to the neutral extent of collecting its taxes. Sound interpretation and enforcement of the trustee's obligations is adequately assured by the interest of the identifiable beneficiaries, that of the settlor during his life, and that of the residuary legatees thereafter, without occasion for intervention of the Attorney General.

Not every public charitable trust will unduly involve the state, nor even every such trust containing religious restrictions. Although it is unnecessary to consideration of this case, in which nearly every variety of potential state involvement has been invoked, to anticipate what results might arise from other states of fact, an unambiguously stated gift into perpetual trust for the benefit of a specific church or church-related institution should not ordinarily entangle the State unduly in religion. No organ of government would have a role in selecting the beneficiary, and the interest of a specific beneficiary or beneficiary class would render academic the Attorney General's duty of oversight. In such a case, exemption from taxes and the Rule Against Perpetuities, as well as other, lesser preferments by government, would seem to partake of that "beneficial neutrality" mandated by the First Amendment.

Therefore, the issues presented here may be resolved on settled principles without impact on the laudable institution of private philanthropy, except to the limited extent that the philanthropist leaves too great a role in the supervision of the administration of his benefice to the State.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Writ should be granted, in that the judgment below is contrary to the controlling decisions of this Court in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Evans* v. *Newton*, 382 U.S. 296 (1966); the *Girard College* case, 353 U.S. 230 (1957); and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); and in that the case presents important questions under the Equal Protection, Establishment and Free Exercise Clauses

not hitherto squarely presented to this Court, upon which the guidance of this Court should be given.

Respectfully submitted,

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APPPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

No. 58,488

THE FIRST NATIONAL BANK OF KANSAS CITY,
Plaintiff-Respondent,

vs.

JOHN C. DANFORTH, ATTORNEY GENERAL OF MISSOURI,
Defendant-Appellant,

and

LAKESIDE HOSPITAL ASSOCIATION, JEWISH MEMORIAL HOSPITAL ASSOCIATION OF KANSAS CITY, RESEARCH HOSPITAL AND MEDICAL CENTER, KANSAS CITY COLLEGE OF OSTEOPATHIC MEDICINE, NORTHEAST OSTEOPATHIC HOSPITAL, SISTERS OF SAINT MARY (owning and operating St. Mary's Hospital), KANSAS CITY GENERAL HOSPITAL AND MEDICAL CENTER, AND CHILDREN'S MERCY HOSPITAL,
Defendants-Appellants,

and

MARTIN LUTHER KING JR. MEMORIAL HOSPITAL,
Appellant,

and

MARY ELIZABETH BLETHROADE SUTT, ELIZABETH MAY JACKSON, CARLY (CAREY) McWILLIAMS, and CASLEY McWILLIAMS, Known Heirs, and the Unknown Heirs of Homer McWilliams, deceased,
Defendants-Appellants,

and

ST. LUKE'S HOSPITAL OF KANSAS CITY, MISSOURI, KANSAS CITY LUTHERAN HOME AND HOSPITAL ASSOCIATION, BAPTIST MEMORIAL HOSPITAL and INDEPENDENCE SANITARIUM AND HOSPITAL,

Defendants-Respondents.

Appeal from the Circuit Court of Jackson County
The Honorable James C. Moore, Judge

(Filed January 13, 1975)

Appeal from declaratory judgment in construction of and upholding a public charitable trust which purports to discriminate among its beneficiaries by race, religion, and national origin. Among the questions is whether the construction involves the State of Missouri and requires the exercise of its powers as to subject the trust to requirements of the United States Constitution, Amendments I and XIV, and Missouri Constitution, Article 1, Sections 2, 5, 7, and 10.

Also involved is an appeal by the Attorney General from a judgment awarding attorneys' fees, said judgment being designated as a separate final judgment for purposes of appeal. Rule 81.06, V.A.M.R.

Homer McWilliams, a bachelor, died testate December 21, 1965, aged 98 years. He was hospitalized in Trinity Lutheran Hospital continuously for the last 18 years of his life. Excluding several irrelevant minor bequests to cousins and friends, his Last Will and Testament, executed November 16, 1934, as modified by its First Codicil, executed March 20, 1946, provided that the bulk of his estate was to be held in trust for certain charitable purposes. The net value of the trust as of December 21, 1965, was $8,485,891.22.[1]

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1. As of January 17, 1974, the value of the trust had increased to $11,392,703.00.

Article XV of the will and codicil devised the remainder of testator's property to his trustees; established the "McWilliams Memorial Hospital Trust"; and directed "that the net income from the Trust Estate * * * be used annually by the Trustees * * * in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a non-profit basis in * * * Jackson County, Missouri, * * * and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America. * * * And I give my said Trustees * * * full power and authority to select, and to give these benefits of this Trust, and to make such distributions to, said Hospital and Hospitals of the kind and character aforesaid as in the judgment and discretion of the Trustees, * * * as they * * * shall determine to be giving and will continue to give the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid."

On May 21, 1969, the First National Bank of Kansas City, as sole surviving trustee, filed a petition which it amended June 18, 1970, "to construe a private and a public charitable trust." The amended petition was in six counts, and named as defendants the Attorney General of Missouri, all twenty-three licensed hospitals believed by plaintiff to be located in Jackson County, and the known and unknown heirs of Homer McWilliams.

In Count V of the petition, the only count relevant to this appeal, plaintiff alleges that it "is unable to ascertain with certainty the meaning of said words (Article XV of the Will) and cannot determine with certainty which hospitals in Jackson County, Missouri, and which patients therein, qualify as possible beneficiaries of the trust."

The petition was separately answered by Mary Elizabeth Blethroade Sutt, Elizabeth May Jackson, (Carey) Carly McWilliams, and Casley McWilliams, each claiming to be collateral heirs of Homer McWilliams; asserting illegality of the trust provisions and that Mr. McWilliams had no general charitable intent; that therefore the trust failed and they were entitled to the *res* as lawful heirs of the testator. The unknown heirs through their appointed attorney took a similar position.

The defendant hospitals who are now appellants (Lakeside Group) separately answered, each asserting that it qualified as a beneficiary of the trust; that compliance with the trust provisions would be discriminatory, illegal, and impossible; and that since testator expressed a general charitable intent, the *cy pres* doctrine should be applied to qualify all nonprofit nongovernmental hospitals in Jackson County and all indigent patients therein as beneficiaries.

The defendant hospitals who are now respondents (St. Luke's Group) separately answered, each alleging that it was a Protestant Christian hospital, operated on a nonprofit basis in Jackson County, caring for sick and infirm patients of all races, colors, creeds, and nationalities, and providing hospital service to deserving poor and unfortunate people; that therefore it qualified as a beneficiary and that the class of patients for which hospital care and services are provided by it, qualifies as a beneficiary under the Trust.

Each of the eight hospitals in the Lakeside Group are tax exempt, nonprofit corporations in Jackson County, Missouri; and licensed under the Missouri Hospital Licensing Law. All have been incorporated by pro forma decree or under the Missouri Not-For-Profit Act. None has any affiliation or connection with any organized church except

St. Mary's Hospital which is operated by the Sisters of St. Mary, a Roman Catholic Order. All admit substantial numbers of charity patients, and none discriminates among its patients, employees, or medical or administrative staff on the basis of race or religion. All are qualified to and do receive governmental Medicare and Medicaid payments, as well as federal funds under Hill-Burton, Federal Manpower, or other Acts.

Each of the four hospitals in St. Luke's Group is also located in Jackson County and is organized and operated in the same manner as the hospitals in the Lakeside Group, except that federal funds received by Baptist Memorial Hospital have been limited to Medicare and Medicaid, and except that each has a special relationship with and is controlled in part by a Protestant Christian Church.

Dr. Robert K. Ordway, President and Dean of the Missouri School of Religion in Columbia, Missouri, expressed opinions in definition of "Protestant" and "Christian." "'Christian' is a term which applies to a body of religious belief and thought and doctrine in which the person, the ministry of Jesus Christ is of paramount importance." Dr. Ordway ascribed two meanings to "Protestant." "The generally accepted understanding of the term 'Protestant'" meant "any Christian religious group which is not either Roman Catholic or Orthodox." In his second and more technical definition, "* * * a 'Protestant,' to speak of a person, is a person who is a member of one of the religious bodies which is able to trace its historical heritage in general to the time of the Reformation, the 15th, 16th [and 17th] centuries, and including specifically the historical perspective that this group originated in some form of protest or an attempt to reform the Roman Catholic Church at that time."

Pursuant to these definitions, Dr. Ordway stated that there were various organizations in Missouri and in the United States which are generally known as Protestant Christian bodies, but which are not organized churches in themselves. Such bodies offer a wide range of social services including homes for children and aged, and schools and hospitals. In order to define such a nonchurch Protestant Christian institution, Dr. Ordway stated, "[t]he basic criteria would be that there is some definable formally accepted relationship which involves either expressed or implied control of that institution by the religious body." This relationship of control also involves "accountability" to the religious body. Without some formally accepted relationship, accepted by both the hospital and the Protestant denomination, such hospital would not qualify as a Protestant Christian Hospital.

In Dr. Ordway's opinion, the Baptist, Lutheran, and Episcopal churches are "Protestant Christian" churches under both his general and technical definitions; and based upon pertinent provisions of their charters and operations to be more fully stated below, their hospitals, Baptist Memorial, Trinity Lutheran, and St. Luke's, would qualify as Protestant Christian Hospitals. The Reorganized Church of Jesus Christ of Latter Day Saints and its hospital were "Protestant Christian" under his general definition; he was unsure whether they qualified under his technical definition.

Dr. Carl Oliver Bangs, a professor of historical theology at St. Paul's School of Theology in Kansas City, agreed with Dr. Ordway that "Protestant" in its general and common sense meaning was any Christian religious group which is neither Roman Catholic nor Orthodox. In his opinion, the Reorganized Church of Jesus Christ of Latter Day Saints can trace its heritage to the Protestant

Christian Reformation, and it and its Independence Sanitarium and Hospital are Protestant Christian entities.

Baptist Memorial Hospital was organized by a group of local Kansas City citizens of the Baptist faith, working primarily through local Baptist churches. The idea and concept of the hospital, although local in origin, evolved into part of the State Baptist Church Organization in Missouri. Its operation is directly controlled and accountable to the annual meeting of the Missouri Baptist Convention. Its purpose "is to found and maintain in Kansas City, Missouri, a hospital, of the highest standards * * * wherein to care for the sick and the afflicted in body and to administer to the bodily needs and to provide loving attention and nursing and service of skilled physicians and surgeons for restoration of such person to health and strength. And therein and thereby do deeds of benevolence of Christian charity to the sick and afflicted in which connection and as incident to the care and treatment of the sick and afflicted, to administer in the name of Christ to their spiritual needs and to the advancement of their spiritual welfare." The hospital must be affiliated with and subject to the Executive Board of the Missouri Baptist Convention. It must be governed by a board of trustees of thirty persons, at least 75 per cent of whom must be Baptists. The hospital cares for both charity and pay patients.

Independence Sanitarium and Hospital must "be operated as a non-profit, non-sectarian institution according to the statutes of this state and patients shall be received and treated without regard to nationality, religion, social or financial position." It is accountable to the Reorganized Church of Jesus Christ of Latter Day Saints with international headquarters in Independence. Its original incorporation was sponsored by the Reorganized Church of Jesus

Christ of Latter Day Saints. Among its aims and objectives is "to be guided by Christian principles, as understood by a sponsoring church—the Reorganized Church of Jesus Christ of Latter Day Saints—in all of its patient care and educational activities. Its policies are established in accordance with the principles of the Reorganized Church of Jesus Christ of Latter Day Saints which has a full measure of control over the appointment of the hospital's governing board. The Board of Trustees is responsible to the Reorganized Church of Jesus Christ of Latter Day Saints. Of the 9-member board, three are members of the Presidency of the Reorganized Church of Jesus Christ of Latter Day Saints and three are members of the Presiding Bishopric of the Church, the six highest spiritual and temporal leaders of the Church. At least six full-time administrators must also be ministers of the Church. The Reorganized Church of Jesus Christ of Latter Day Saints provides financial support for the hospital building fund and for indigent patients. If dissolved, the hospital's assets must be transferred to the Bishop of the Reorganized Church of Jesus Christ of Latter Day Saints.

Trinity Lutheran Hospital is owned and operated by Kansas City Lutheran Home and Hospital Association. Kansas City Lutheran is operated under the control and auspices of the Central States Synod of the Lutheran Church of America. A majority of the board of directors and the chief administrator of the hospital must be communicant members of the Lutheran Church of America. The chief administrator must report the hospital's operation annually to the annual convention of the Central States Synod. In the event of dissolution of Kansas City Lutheran, its property and funds are to be distributed to the West Central Conference of the Augustana Evangelical Lutheran Church or its successor, the Central States Synod, or its successor. The Lutheran Church of America is not

a part of the Roman Catholic Church, the Old Catholic Church, or the Western Church, and does not recognize the Pope as its spiritual or administrative head.

St. Luke's Hospital is affiliated with the Protestant Episcopal Church in the United States of America, and particularly with the Diocese of West Missouri. All members of its board of directors are members of the Protestant Episcopal Church in the United States of America. The Bishop of the Diocese of West Missouri is the chairman of the board of directors.

The court, pursuant to findings of fact and conclusions of law, ordered, adjudged and decreed:

"That the words 'Protestant Christian Hospital' as used in the Last Will and Testament of Homer McWilliams and the First Codicil thereto are construed to mean those hospitals that have some special relationship to and at least partial control by a Protestant Christian church.

"That the words 'Protestant Christian' as used in said Will and Codicil thereto are not indefinite, and the class of hospitals intended can be determined.

"That the selection of beneficiaries of the trust according to the provisions of said Will and Codicil thereto will not result in unlawful discrimination based on race or religion and is lawful.

"That the Baptist Memorial Hospital, the Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all qualify as proper beneficiaries under the Will of Homer McWilliams and the First Codicil thereto, and none of the other defendant hospitals do so qualify."

Appellant hospitals, the Lakeside Group, joined by appellant Martin Luther King, Jr. Memorial Hospital, contend the court erred:

I. In ruling respondent hospitals to be "Protestant Christian," because (1) the phrase "Protestant Christian" is so vague and uncertain that its meaning and effect cannot be defined or determined, and (2) even if its meaning can be determined there are no "Protestant Christian" hospitals in Jackson County and, as a consequence, "Protestant Christian" should be stricken from the trust;

II and V. In enforcing the trust's "racial and religious restrictions" for the reason such judicial action violates the United States Constitution, Amendments I and XIV, and Missouri Constitution, Article 1, Sections 2, 5, 7, and 10, by implicating the State of Missouri in unlawful discrimination;

III. In enforcing the trust's "discriminatory" provisions when it is so related to an inherently public aspect of community life as to be governed by the proscription of the United States Constitution, Amendment XIV, as demonstrated by (A) the public charitable nature of the trust; (B) the public nature of the beneficiaries and the functions they serve, and (C) the quasi-public nature of the trustee, a national banking agency and instrumentality of the federal government;

IV. In qualifying respondent hospitals and in refusing to qualify appellant hospitals as trust beneficiaries based on religious doctrine forbidden by United States Constitution, Amendments I and XIV;

VI. In refusing to apply the doctrine of *cy pres* so as to strike the trust's "unlawful racial and religious restrictions, for the reason that the trust * * * exhibits a general charitable intent to benefit all non-profit, non-governmental hospitals in Jackson County, Missouri, and all patients therein."

Appellants known and unknown heirs of the testator assert:

I. Certain "basic legal requirements of a valid public charitable trust, viz., (A) it must conform to existing law to be valid; (B) testator's expressed and unambiguous intent governs unless contrary to law; (C) the main object and purpose of the charity cannot be changed; (D) a purported trust void on its face or illegal or impossible of performance is a nullity; (E) where the heirs of the donor no longer have any lawful interest in the trust assets, courts have greater freedom in determining the proper use of such funds, to concede:

II. The dominant specific and limited charitable purpose of testator was to create a public charitable trust to secure "the greatest measure of hospital service and care to deserving poor and unfortunate people of the class aforesaid," to wit, "Sick and infirm patients in said hospitals (Protestant Christian Hospitals) born of white parents in the United States of America"; but to assert the court erred:

III. In entering a judgment which placed the State in a position of sponsoring and promoting racial and religious discrimination and making it the duty of the trustee and state officers to enforce the trust in direct violation of constitutional provisions;

IV. In ruling that its construction of the trust would not result in unlawful discrimination based on race;

V. In its construction because it advances religion in a partisan way by giving aid and encouragement to "one Christian Protestant Religion" to the exclusion of all other religions; all to conclude:

VI. That the intent of this trust was to aid a special kind of charity in violation of constitutional provisions,

rendering the instrument illegal and void, thereby foreclosing resort to any auxiliary rules of construction such as *cy pres* or deviation, all to conclude that the purported trust failed leaving the trust *res* to pass to the testator's heirs.

Appellant Attorney General contends the court erred:

I. In determining that the trust will not result in unlawful discrimination based on race for the reason that under the "sifting facts and circumstances test," Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), there exists the requisite state action, in that the creation, administration, and enforcement of the charitable trust, necessitates involvement of the State through its statutes, elected officials and courts, and requires the exercise of powers possessed by the State, thereby subjecting any action thereunder to the constitutional guarantee of equal protection of law under the United States Constitution, Amendment XIV, and therefore any racial limitation should be declared null and void and stricken from the trust, by virtue of testator's general charitable intent.

Under II, the Attorney General is neutral on the declaration that certain hospitals, the St. Luke's Group, are Protestant Christian Hospitals, but asserts jurisdiction in the court to determine if the phrase "Protestant Christian Hospitals" is vague and unenforceable without infringing on constitutional provisions for the reason that the subject of controversy is a will which establishes a charitable trust, in order to contend the court erred:

III. In failing to apply the doctrine of deviation or of *cy pres* to benefit all defendant hospitals.

Appellant Attorney General contends also, with respect to the judgment awarding plaintiff's attorneys' fees,

that the court erred in the fee allowed to plaintiff's attorneys asserting it was excessive and unreasonable.

The problem here is the construction of the quoted provisions of Article XV of the will of Mr. McWilliams; and there are many cases replete with the familiar rules governing resolution of construction problems.

The object is to ascertain the testator's intention. If the intention is plain and unambiguous, such intention must govern, provided it is not contrary to law. If the will contains plain and unambiguous language, courts give effect thereto, and have no authority to do otherwise on the ground that provisions of the instrument are not in harmony with the trend of the times. First National Bank of Kansas City v. Waldron, 406 S.W. 2d 56, 58, 59 (Mo. 1966). The function of the court is to construe the will as written by the testator and not to make or rewrite one for the testator under the guise of construction. Burrier v. Jones, 338 Mo. 679, 92 S.W. 2d 885, 887[1] (banc 1936). The testator is presumed to know and intend the legal effect of the language he employs in his will, First National Bank of Kansas City v. Hyde, 363 S.W. 2d 647, 653[8] (Mo. 1962); the courts give his words their plain and ordinary meaning, Cox v. Jones, 229 Mo. 53, 129 S.W. 495, 498 (1910), and take judicial notice of those meanings, City of St. Charles ex rel. Palmer v. Schulte, 305 Mo. 124, 264 S.W. 654, 655[2] (1924). Where a charitable trust is in issue, it is considered that charitable gifts and trusts are favorites of the law and will be construed as valid when possible by applying the most liberal rules of which the nature of the case admits, and are often upheld where a private trust would fail. Burrier v. Jones, supra, 92 S.W. 2d l.c. 887[7]; Ervin v. Davis, 355 Mo. 951, 199 S.W. 2d 366, 368[2] (1947).

It is not questioned that the will of Mr. McWilliams created a charitable trust. Suffice to say that his trust meets the definition of a charitable trust in Restatement of Trusts 2d, Section 348, page 210, viz., "* * * a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." With respect to the charitable purposes of Mr. McWilliams, see Taylor v. Baldwin, 362 Mo. 1224, 247 S.W. 2d 741, 749]2] (banc 1952), and see, generally, Voelker v. St. Louis Mercantile Library Ass'n, 359 S.W. 2d 689, 693-694[4] (Mo. 1962); Buchanan v. Kennard, 234 Mo. 117, 136 S.W. 415, 421-422[8, 9] (Mo. 1911).

There are two identifiable classes of beneficiaries designated by Mr. McWilliams to which his trustee, in its discretion, is empowered to distribute the income from his trust estate. First is the class of nonprofit Protestant Christian Hospitals located in Jackson County, Missouri; second is the class of sick and infirm patients in said hospitals, born of white parents in the United States of America.

The designation of the first class is unambiguous and is determinable irrespective of the expert testimony of Dr. Ordway and Dr. Bangs which is consistent with and supports such determination.

In Conway v. Third Nat. Bank & Trust Co. of Camden, 177 A. 113 (N.J. 1935), the trust was asserted to be indefinite, uncertain, and impossible of execution where the testator directed his trustees to select as his beneficiaries children with Christian antecedents. The court in upholding the designation of such a class, said, "It is hardly necessary to say that a Christian is one who believes or professes or is assumed to believe in Jesus Christ and

the truth as taught by Him * * *." 177 A. l.c. 116. Black's Law Dictionary, Rev. 4th Ed. (1968), defines "Christian" as "pertaining to Jesus Christ or the religion founded by him; professing Christianity. As a noun it signifies one who accepts and professes to live by the doctrines and principles of the Christian religion; it does not include Mohammedans, Jews, pagans, or infidels * * *." See also 76 C.J.S. 736, Religious Societies, § 1.

76 C.J.S., Supra, page 741, defines "Protestant" as "A Christian who protests against the doctrines and practices of the Roman Catholic Church; a general term comprehending all those who, professing Christianity yet are not in the communion of the church of Rome; a collective name for a large class of Christian denominations, and embracing all such denominations, except the Roman Catholic and Eastern Churches." Black, supra, defines "Protestants" as "Those who adhered to the doctrine of Luther; so called because, in 1529, they protested against a decree of the emperor Charles V. and of the diet of Spires, and declared that they appealed to a general council. The name is now applied indiscriminately to all the sects, of whatever denomination, who have seceded from the Church of Rome." See also Nicholas v. Evangelical Deaconess Home and Hospital, 281 Mo. 182, 219 S.W. 643, 646 (1920).

In short, "Protestant Christian" is not ambiguous. Both terms have an ascertainable meaning; and in common and familiar usage denote a non-Catholic Christian religious body. When the non-Catholic Protestant Christian entity is a hospital, as in the McWilliams trust, it reasonably means, as found by the trial court and applied to St. Lukes, Trinity Lutheran, Baptist Memorial, and Independence Hospitals, a hospital that has some relationship to and control by a Protestant Christian Church, and when

such bodies are selected in the trustee's discretion, such class becomes fixed and definite. Epperly v. Mercantile Trust & S. Bank of Quincy, Ill., 415 S.W. 2d 819, 821, 822 (Mo. 1967); Yeager v. Johns, 484 S.W. 2d 211 (Mo. 1972).

It has been recognized in several instances that secular institutions such as colleges and hospitals are properly operated under the "control," "auspices," or "management" of religious entities. See, e.g., In re Estate of Hall, 193 S. 2d 587 (Miss. 1967); State ex rel. Morris v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S.W. 990 (1903); State ex rel. Waller v. Trustees of William Jewell College, 234 Mo. 299, 136 S.W. 397 (1911); Farm & Home Savings & Loan Ass'n v. Armstrong, 337 Mo. 349, 85 S.W. 2d 461 (banc 1935); Bradfield v. Roberts, 175 U.S. 291 (1899); Speer v. Colbert, 200 U.S. 130 (1906). In such instances, the institutions may be creatures of the governments under which they are organized, yet they are commonly recognized and held out to be "sectarian" institutions with emphasis on the particular sect involved.

The argument of appellant hospitals, the Lakeside group, that in order to classify a hospital as "Protestant Christian" it must be one organized by Protestant Christians, operated by Protestant Christians for the sole and exclusive benefit of Protestant Christians, begs the true question under the foregoing authorities and under the evidence in this case that the four respondent hospitals, the St. Lukes group, are Protestant Christian hospitals serving and offering facilities to the public, sectarians and nonsectarians, and patients of all descriptions alike.

It should be noted also that the court's finding in this respect does not preclude hospitals other than the respondent St. Lukes group from qualifying as beneficiaries of this trust in the future upon a showing they are Prot-

estant Christian hospitals operated on a nonprofit basis in Jackson County. None of the other hospital defendants make any claim that it has any relationship to or control by a Protestant Christian church. Each of them claims only that the limitation of beneficiaries to "Protestant Christian hospitals" is illegal and should be stricken.

The designation of the second group of beneficiaries is also unambiguous and determinable.

The bequest for the benefit of "sick and infirm patients" in specific hospitals is sufficiently definite for a charitable trust. Buchanan v. Kennard, supra. The same is true of the designation "born of white parents in the United States of America." See e.g., Olivas v. The Board of National Missions of Presbyterian Church, 405 P. 2d 481 (Ariz. 1965), sustaining a trust "for homesite for Yaqui Indians"; In re Estate of Hall, supra, clarified 195 S. 2d 94, modified 197 S. 2d 235, sustaining a trust to "Christian (church school—any denomination but prefer a Methodist College) education of poor boys and girls as long as world stands"; Allaun v. First & Merchants Nat. Bank of Richmond, 56 S.E.2d 83 (Va. 1949), recognizing validity of a trust for the "white poor of Powhatan County"; Bronson v. Strouse, 17 A. 699 (Conn. 1889), upholding validity of a trust to pay interest to a "poor, deserving, Jewish family residing in the city of New Haven"; Beardsley v. Selectmen of Bridgeport, 3 A. 557 (Conn. 1886), validating a trust "for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut."

Appellants' charge that administration of this trust as now construed will result in both religious and racial discrimination in violation of United States Constitution, Amendments I and XIV, stems from the statement in 25 A.L.R. 3rd 736, 739 (1969):

"Under the more recent United States Supreme Court decisions, a charitable gift which is of such a nature that it will tend to carry out a function normally regarded as public in nature, or will require for its administration some governmental act, either in the way of enabling legislation or necessary governmental administration, will constitute a violation of the rights afforded by the Fourteenth Amendment * * * if the beneficiaries thereof are limited or defined in terms including the race or religion of an otherwise eligible beneficiary.

"In those cases where a gift of this nature is not enforced pursuant to the exclusion under consideration, either because the gift is held void under general considerations, as being too uncertain in its selection of beneficiaries or as involving proscribed state action, or because of the refusal of the trustee to take the gift under the conditions imposed, the courts have evidenced a desire to effect the general purposes of the gift by deleting the racial or religious exclusion, rather than to hold the gift void in its entirety,[2] although in a few cases this type of gift has been held to revert to the grantor or his heirs."[3]

Appellants suggest that where forbidden invidious discrimination exists in a charitable trust, four theories have been advanced in the search for existence of "proscribed state action" which renders null and void a discriminatory provision in the trust instrument. These are characterized as the "public arena" theory found in Evans v. Newton, 382 U.S. 296 (1966); the "state function" theory employed in the so-called "white primary cases," e.g., Nixon v. Herndon, 273 U.S. 536 (1927); the "state property" theory,

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2. The position taken by appellants Lakeside group and Attorney General seeking application of *cy pres* or deviation.

3. The position taken by appellants known and unknown heirs seeking reversion of the trust *res*.

e.g., Hampton v. City of Jacksonville, 304 F. 2d 320 (5th Cir. 1962); and the "sifting facts and weighing circumstances" theory of Burton v. Wilmington Parking Authority, supra. See also the Girard Trust cases, particularly Commonwealth of Pennsylvania v. Brown, 392 F. 2d 120 (3rd Cir. 1968); Shelley v. Kraemer, 334 U.S. 1 (1968); Barrows v. Jackson, 346 U.S. 249 (1953); Bank of Delaware v. Buckson, 255 A. 2d 710 (Del. 1969); Milford Trust Co. v. Stabler, 301 A. 2d 534 (Del. 1973); Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (1963); Eaton v. Grubbs, 329 F. 2d 710 (4th Cir. 1964); Connecticut Bank & T. Co. v. Johnson Memorial Hospital, 294 A. 2d 586 (Conn. 1972), involving discrimination based upon race. Similar cases involve discrimination based upon religion, e.g., Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); State v. Madison, 213 A. 2d 880 (Md. 1965).

Appellants pose two questions to be answered in determining whether this trust contains restrictions which violate the Fourteenth Amendment: (1) Are its restrictions discriminatory? (2) If so, are they so purely private as to lie outside the scope of the Fourteenth Amendment?

On question (1), appellants assert that the trust's racial and religious discriminations are *per se* and under all circumstances discriminatory. They argue that state action is involved in the administration of this trust, asserting variously that: "Judicial action enforcing the trust's discriminatory provisions is 'state action'" under the cases, particularly the Civil Rights cases, Shelley v. Kraemer, Barrows v. Jackson, Evans v. Newton, Bank of Delaware v. Buckson, Milford Trust Co. v. Stabler, supra, and Hawaiian Trust Co. v. Caffaro, No. 26496, Circuit Court of the First Circuit of Hawaii (unpublished opinion); that the statutory right to make a will and to create a trust,

the right to give it perpetual existence, to have it construed, to have a trustee and accounting, the right to tax benefits, and the public nature of the trust, *show the requisite* "state action" to strike the discriminatory restrictions of the trust under the "sifting facts and weighing circumstances test" of Burton v. Wilmington Parking Authority, supra, and the performance of a "function of the state" as in Eaton V. Grubbs and Evans v. Newton, supra; that, absent these factors, the Fourteenth Amendment would be violated by administration of this trust due to the public charitable nature of the trust itself, the public function fulfilled by the hospital beneficiaries under Simkins v. Moses H. Cone Memorial Hospital, supra, and the public functions served by the trustee, a national banking association.

On question (1) respondents concede that racial discrimination will result from selection of only white patients as one class of beneficiaries of this trust; however, it is at most arguable whether racial discrimination will result *per se* from selection of only "Protestant Christian hospitals" as the other class of beneficiaries of this trust. See Bradfield v. Roberts, supra; Speer v. Colbert, supra; State ex rel. Morris v. Board of Trustees of Westminster College, supra; Wyatt v. Stillman Institute, 303 Mo. 94, 260 S.W. 73 (1923); Society of Helpers of Holy Souls v. Law, 267 Mo. 666, 186 S.W. 718 (1916).

On question (2), even if it be assumed that racial discrimination or religious discrimination, or both, be present, such discrimination in the administration of this trust is not illegal under the Fourteenth Amendment because "state action" is not involved.

The Fourteenth Amendment provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See also Missouri Constitution, Article 1, Sections 2, 5, 7, and 10. Appellants recognize, as they must, that this amendment does not prohibit racial and religious discrimination in private transactions unless "state action" is involved. "The Civil Rights cases * * * 'embedded in our constitutional law' the principle 'that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment exerts no shield against merely private conduct, however discriminatory or wrongful.' * * * Shelley v. Kraemer * * *. It was language in the opinion in the Civil Rights Cases * * * that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequences upon 'State action of every kind . . . which denies . . . the equal protection of the laws.' * * * some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon 'state participation through any arrangement, management, funds or property.' Cooper v. Aaron, 358 U.S. 1, 4 (1958). It is clear, as it always has been since the Civil Rights Cases * * * that 'Individual invasion of individual rights is not the subject-matter of the amendment,' * * * and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Authority, supra, 365 U.S. l.c. 721-722. Note also that in Evans v. Newton, supra, it was only because state action was required to carry out the terms of the will in question that its discriminatory pro-

visions could not be enforced. Absent such required state action, such discrimination would not be illegal because "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State, * * * *arguendo* * * * no constitutional difficulty would be encountered." 382 U.S. l.c. 300.

Under the facts of this case, "state action" was not involved in the creation of the trust, nor is it required to carry out its term. Mr. McWilliams was a private individual, and the corpus of his trust derived solely from his private funds. The trustee is a privately owned bank and it selects beneficiaries in each class in an exercise of unlimited discretion. Nothing in the will limits the use of funds given to "Protestant Christian hospitals"; nothing prohibits or prevents such hospitals from using the money for any purpose within the purview of their charters, including rendering services and offering facilities without regard to race, religion or national origin, and they do perform these functions without discrimination. Once the trustee has exercised its discretion as to which of the Protestant Christian hospitals provides the greatest measure of services to the poor and deserving of the class described and distributions are made to such hospitals, no provision of the will restricts the use of the funds by the hospitals. Similarly, the trustee has the discretion to select deserving individuals of the class of "sick and infirm patients in said hospitals born of white parents in the United States * * *." No public body is involved in the latter selection because payments to any such beneficiaries would flow directly from the trustee to them.

Such circumstances in this case distinguish this case from those in which the trustee is a governmental body. See e.g., Evans v. Newton, supra; Evans v. Abney, 396 U.S. 435 (1970).

Nor has the court in construing this trust engaged in "sponsoring," "promoting," or "enforcing" discrimination, as in Shelley v. Kraemer, supra, and Barrows v. Jackson, supra, where the court was asked to rule the legality of a restrictive covenant prohibiting real estate sales to blacks, and to implement the holding by affirmative judicial action such as ouster from possession of the black owner or granting a money judgment and execution.

By way of contrast, the court was asked to determine only the hospitals intended by the testator to be identified. The court was not asked to direct the trustee nor to execute the trust, nor to choose beneficiaries. It was asked only to construe a trust provision to determine a testator's intent. Cf. Bank of Delaware v. Buckson and Milford Trust Co. v. Stabler, supra.

If appellants' arguments were sustained, then no transfer of property by will to a religious institution or to a person of a designated race could be valid if a construction of the will's provisions became necessary. Such is not an indicated result under the law. Evans v. Newton, supra. See also Moose Lodge No. 107 v. Irvin, 407 U.S. 163 (1972). See also discussion of "state action" as to bring into play the prohibition of the Fourteenth Amendment in Guillory v. Administrators of Tulane University, 212 F. Supp. 674, 683-687[6] (E.D. La. 1962), and In re Girard College Trusteeship, 138 A. 2d 844, 851-852 (Pa. 1958).

Neither is "state action" present simply because a public trust is involved. Voelker v. St. Louis Mercantile Library Ass'n, supra, 359 S.W. 2d l.c. 693-694; Buchanan v. Kennard, supra, 136 S.W. l.c. 421-422; nor is "state action" involved because of the public nature of the hospital beneficiaries and their regulation or partial funding by the government. Simkins v. Moses H. Cone Memorial

Hospital, supra; Ward v. St. Anthony Hospital, 476 F. 2d 671, 675 (10th Cir. 1973); Stanturf v. Sipes, 224 F. Supp. 883 (W.D. Mo. 1963), aff. 335 F. 2d 224 (8th Cir. 1964). Nor is the trustee bank engaging in significant encouragement of discrimination as to constitute a "state action." Kruger v. Wells Fargo Bank, 521 P. 2d 441 (Cal. banc 1974). If it were so, then no national bank could act as executor or trustee where the devise was to a church or to a racially determined person.

The last word on the subject of "state action" demonstrates the absence of "state action" in this case. Under Jackson v. Metropolitan Edison Co., ... U.S. ..... (1974), 43 L.W. 1097 (12/23/74), a utility's discontinuance of electric service for nonpayment of bills is not action under color of state law which must meet due process standards. The court observed that despite extensive and detailed state regulation of the utility, there is not a sufficiently close *nexus* between the state and the utility's act to require treatment as state action. The court concluded that neither the utility's monopoly status nor its performance of an important public service warranted holding otherwise, i.e., the State never directed nor authorized the challenged practice, and the court could not find the "symbiotic relationship" that warranted a state action finding in Burton v. Wilmington Parking Authority, supra.

Appellants charge also that the court's construction involves factors of religious doctrine and results in aid and encouragement to one Protestant Christian religion to the exclusion of all others.

Suffice to say that this decision does not spring from resolution of ecclesiastical or religious doctrinal issues. See Watson v. Jones, 80 U.S. 679 (1871); Presbyterian Church v. Hull Church, supra, 393 U.S. l.c. 451. The issue here resolved was what hospitals and persons Homer McWil-

liams intended to identify, and was not whether any of such hospitals was, in itself, a "Protestant Christian" entity. There was no contest over rights regulated by ecclesiastical law or religious doctrine; and there is no contention that any party to this suit has discriminated against any patient on account of his religion.

With the case in this posture, there is no room for application of *cy pres* or deviation and they need not be discussed. Neither is there any failure of the trust to cause the trust *res* to pass to testator's heirs.

There were twenty separate applications for attorneys' fees, supported by time and work sheets, oral testimony, and memoranda covering the criteria applicable to such allowances. Attorneys for appellant hospitals adduced expert testimony that a reasonable rate in Kansas City for services of the nature of those rendered by such attorneys was "at least" $50 per hour. Mr. Bush testified in support of his firm's application: that he was the senior member of his firm and had done about 95 per cent of his firm's work in this case, the remainder having been accomplished by his partner, Mr. Snapp; that he had no fee arrangement with the plaintiff trustee except his firm was to be paid a reasonable fee to be determined by the court, payable from the trust assets; that he had no way to receive a contingent fee as in the case of attorneys for the known heirs who, if successful, could receive several million dollars each in fees; that the court should consider all the criteria generally recognized as applicable to the problem of his fee, e.g., time and labor, novelty and difficulty of questions, the caliber of the attorneys representing his opposition, results obtained, amount involved both in dollars and responsibility, the one-time nature of the professional relationship, experience, reputation and ability of the lawyers performing services, whether the fee is fixed

or contingent; that he had been with this case more than five years, over four and a half of which were in court; that he had not collected any fee; that he had at least $30,000 in office overhead attributable to the case; that he and his partner had over 1600 hours invested in the case; that the court should fix the fee at no less than that authorized by Section 473.153, RSMo 1969, for fees for executors or administrators in probate estates; that there is a difference between attorneys for the hospital defendants; that he was the lead attorney and was involved in acute tax matters and in six counts of the suit, whereas attorneys for the other parties were involved only in Count V; that he fell heir to all the mechanical work necessary to keep the litigation moving; that had he not been successful, the entire trust might have failed and devolved to the heirs and none of the hospitals or indigents intended to benefit from the trust would have realized any such benefit.

All applications were granted as prayed except for the prayer of the attorneys for the trustee. The fees for attorneys representing defendant hospitals were allowed on the time-rate basis suggested by their expert. The court was unable to accept the request of plaintiff's attorneys for an allowance of $234,000 for fees and expenses to the extent it was based on a percentage formula in the Probate Code. The ultimate allowance of $176,000 to plaintiff's attorneys, although approximately one fourth less than that prayed, is the only allowance in question.

Factors to be considered as guides in determining the reasonableness of such allowance include:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood * * * that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the area for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) Whether the fee is fixed or contingent." Rule 4-DR, 2-106. See also American Bar Association Code of Ethics.

It is recognized also that an attorney for a trustee in a will construction suit is entitled to be paid the full value of his services, while attorneys for claimants to the estate are entitled to be paid only for the value of their services to the estate. Trautz v. Lemp, 334 Mo. 1085, 72 S.W. 2d 104 (1934); St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W. 2d 578 (1945); Lang v. Taussig, 194 S.W. 2d 743 (Mo. App. 1946).

In support of the judgment allowing attorneys' fees, and in particular of the allowance to plaintiff's attorneys, the trial court filed a memorandum opinion:

"This suit was commenced by the corporate trustee to obtain a construction of the trust provisions of the will. The Attorney General and all hospitals in Jackson County, Missouri, then licensed as such, were joined as defendants. By amendment two possible heirs at law of the testator

were impleaded, as well as the unknown heirs. The appointed attorney for the unknown heirs investigated other possible heirs, and two more intervened.

"Most of the parties have prayed the allowance of attorney's fees to be paid from the trust estate. Evidence has been adduced as to the particular services and their value and as to the ordinary and customary charge for such services. This Court must resolve the question of who is entitled to an allowance and the further question of what amount is reasonable and proper. * * *

"Those * * * who * * * seek allowances can be grouped in some instances. Before discussing them it is appropriate to make some comment.

"One of the cases cited is Mercantile Trust Company National Association v. Jaeger, 457 S.W. 2d 727 (Mo. en banc 1970). The holding in that case is of minimal value here, for the issue was whether attorney fees should be allowed to the trustees where the litigated issue was the proper compensation of the trustees themselves.

"The opinions are, however, valuable for other reasons. First, they collate and discuss the controlling precedents. Second, they illustrate how widely seven trained and experienced minds can honestly differ. *Mercantile, supra,* at 733-734, 736, 743-746.

"The other case is City of St. Louis v. McAllister, 257 S.W. 425 (Mo. en banc 1924) * * *. There the general rule is announced at length. Allowances were made to heirs who intervened.

"To return to the applicants here, the most readily handled defendants are those who prevailed. They succeeded in obtaining a construction * * * which upholds the trust without modification or resort to the doctrine of

cy pres. These are Trinity Lutheran Hospital, St. Luke's Hospital, Baptist Memorial and Independence Sanitarium.

"In general, the remaining hospital defendants did not seek the destruction of the trust but rather a construction of the trust provisions sufficiently broad so as to encompass them. Six of these, Lakeside, Jewish Memorial, Research, Kansas City College of Osteopathic Medicine, Northeast Osteopathic, and St. Mary's, aligned themselves together with a view toward minimizing duplication of work; * * *

"The eight mentioned together with Wheatley-Provident, Downtown, Plaza, St. Joseph, and Neurological hospitals participated actively in the trial * * * and made contributions. They do not have to be 'winners' to be allowed attorney fees from the trust estate. Trautz v. Lemp, 72 S.W. 2d 104, 107 (Mo. en banc 1934).

"There has never been any question as to the propriety of an allowance to the attorney for the unknown heirs. The unknowns were joined in the hope that a final adjudication could be made, one binding on all concerned.

"How does this affect the heirs at law who were joined as defendants or who intervened when they learned of the litigation? The attorney for the unknown heirs performed the role of devil's advocate. For this he is to be compensated. Are the individual heirs less deserving of allowances? The named defendants were not mere volunteers, nor were the intervenors who responded to the invitation when the unknown heirs were summoned.

"The Court is not unaware of the 'no benefit, no fee' rule. Nor is the Court unmindful that the individuals were actuated by self-interest and that their attorneys would have been handsomely rewarded had they been successful. * * *

"The propriety of allowances to the individuals is not free from doubt. Mercantile Trust Company National Association v. Jaeger, *supra* and especially Judge Seiler's discussion of St. Louis Union Trust Company v. Kaltenbach, 186 S.W. 2d 578, in his dissenting opinion, 457 S.W. 2d at 744-746.

"However, the nature of this case and the posture of the individual defendants caused them to contribute to the construction of the trust instrument and thereby a benefit to the trust estate. They should receive allowances.

"The amount of allowances should be governed by traditional considerations codified in Supreme Court Rule 4 and especially DR 2-106 of that rule. There is ample evidence in the record to enable the Court to take the listed factors into consideration as guides in determining the reasonableness of the fee allowances.

"No unusual problem is encountered until reaching the application of the trustee. The Court accepts the written application and supporting oral testimony of its counsel. The services have been outstanding, the problems complex. The amount involved is great, and the result obtained is that sought. The Court, however, is unable to accept a percentage formula derived from the Probate Code. Likes must be compared with likes, and there are too many differences between an allowance by the probate court in the administration of an estate and an allowance in an equity case such as the instant one. The factors have been balanced and a result reached considerably in excess of other allowances herein and considerably less than that prayed."

The foregoing memorandum has been quoted in near entirety because it demonstrates that the trial judge, the Honorable James C. Moore, appreciated the difficulties and

differences of opinion inherent in the task of setting attorneys' fees, considered the evidence on the issue in detail, and considered and made application of the appropriate legal standards and criteria to the evidence in resolving the issue.

Judge Moore has been a lawyer in Kansas City, Missouri, since 1934, and a judge of the Circuit Court of Jackson County, Missouri, since 1963. Official Manual State of Missouri 1973-1974. Judge Moore, more than any person, was in position to judge the relative value of all legal services rendered in this case and those rendered by the attorneys for the trustee in particular. The judgment may not be disturbed unless clearly erroneous. Scott v. Home Mutual Telephone Co., 510 S.W. 2d 793, 795 (Mo. App. 1974). Such a demonstration is absent in this case. As observed in Donaldson v. Allen, 213 Mo. 293, 111 S.W. 1128, 1129[1] (1908), "* * * the judge deciding the point presumptively knew the character of the services rendered in duration, zeal, and ability. He presumptively knew the value of them according to custom, place, and circumstance. * * * In this view of the matter, there is room for a most violent presumption that the trial court did not err in gauging the quantum of the fee." See also Sebree v. Rosen, 393 S.W. 2d 590 (Mo. 1965); Billinger v. Jost, 510 S.W. 2d 57, 58 [1, 2] (Mo. App. 1974).

Judgments on both the merits and in allowance of attorneys' fees affirmed.

Andrew Jackson Higgins, Commissioner

Welborn, C., concurs.

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court. All of the judges concur.

APPENDIX B

IN THE CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT
Division 9

No. 726,091

THE FIRST NATIONAL BANK OF KANSAS CITY,
A National Banking Association,
Plaintiff,

vs.

THE HONORABLE JOHN C. DANFORTH, Attorney General of Missouri, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Now on this day the Court again takes up this cause and having heretofore tried the issues raised in Count I of the First Amended Petition herein at a separate trial held pursuant to Rule 66.02 and having heretofore specifically designated its judgment entered at that trial on Count I to be a final judgment for the purposes of Appeal pursuant to the provisions of Rule 81.06, the Court now takes up the issues raised in Counts II to VI inclusive of said First Amended Petition and again, pursuant to the provisions of Rule 66.02, orders that a separate trial be held as to the issues raised in said Counts only and specifically reserves and retains jurisdiction to hear and determine, in a separate trial to be held later, the issues of whether or not any of the parties hereto or their attorneys are entitled to be allowed reasonable attorney's fees to be paid out of the trust estate and if so the amount thereof,

AND THE COURT, now having heard the evidence relating to the issues raised in Counts II to VI inclusive of said First Amended Petition, and having read and considered the briefs of counsel, and being fully informed in the premises, does hereby make the following findings of fact and conclusions of law and does hereby enter the following judgments:

Findings of Fact Common to All Counts

1. The Court makes the following findings of fact common to all counts in the petition:

(a) That this is an action to construe the Last Will and Testament, together with the First Codicil thereto, of Homer McWilliams, deceased, in which he created the McWilliams Memorial Hospital Trust, a public charitable trust.

(b) That plaintiff herein is a national banking association duly organized and existing according to law and is lawfully vested with authority to exercise trust powers.

(c) That defendant John C. Danforth is the duly elected and acting Attorney General of the State of Missouri, and in such capacity is the proper party to represent the citizens of Missouri in litigation involving the construction of a public charitable trust.

(d) That defendants Baptist Memorial Hospital, Downtown Hospital Foundation, Florence Crittenton Home, Kansas City General Hospital & Medical Center, Kansas City College of Osteopathy and Surgery, Lakeside Hospital Association, Plaza Hospital, Inc., Research Hospital and Medical Center, St. Joseph's Hospital, St. Luke's Hospital of Kansas City, Missouri, The Willows Maternity Sanitarium, Inc., Independence Sanitarium and Hospital, Kansas City Lutheran Home and Hospital Association,

Western Missouri Mental Health Center, The Children's Mercy Hospital, Doctors' Osteopathic Hospital, Jackson County Public Hospital, Jewish Memorial Hospital Association of Kansas City, Northeast Osteopathic Hospital, Neurological Hospital Association, Sisters of Saint Mary, Veterans' Administration Hospital, and Wheatley-Provident Hospital constitute all of the licensed hospitals located in Jackson County, Missouri, known to plaintiff, and are named as defendants as possible beneficiaries of the trust.

(e) That defendants Elizabeth May Jackson, Mary E. Blethroade, Casley McWilliams and Carey McWilliams are the only known heirs-at-law of Homer McWilliams, deceased; that there may be unknown and unborn heirs-at-law of Homer McWilliams, deceased, and that Jesse L. Childers, an attorney at law duly admitted to practice before this Court, has heretofore been appointed as attorney for such unknown and unborn heirs and has duly represented them.

(f) That Homer McWilliams died on December 21, 1965, and his Last Will and Testament, together with a First Codicil thereto, was duly admitted to probate in the Probate Court of Jackson County, Missouri, as Estate No. 99,800; that a copy of said Last Will and Testament of Homer McWilliams, and the First Codicil thereto, is attached to the petition herein, marked "Exhibit A," and has been duly admitted in evidence.

(g) That under the provisions of Article XV of said Last Will and Testament as modified by the First Codicil thereto, the said Homer McWilliams established the McWilliams Memorial Hospital Trust, a public charitable trust, for the purpose of providing maintenance and support for certain charitable hospitals and needy persons, all as more fully set out in said Last Will and Testament and the First Codicil thereto.

(h) That under the provisions of said Last Will and Testament of said Homer McWilliams, and the First Codicil thereto, Corilanus Thorp, Jr., and The First National Bank of Kansas City, the plaintiff herein, were named as Co-Trustees of said trust; that thereafter and on February 23, 1968, Corilanus Thorp, Jr., died, and under the provisions of the Last Will and Testament and the First Codicil thereto, The First National Bank of Kansas City, this plaintiff, became the surviving and sole Trustee of the public charitable trust above mentioned and is now serving in such capacity.

(i) That the Executors of the Estate of Homer McWilliams, pursuant to the provisions of the Last Will and Testament of Homer McWilliams, deceased, have paid and delivered to the Trustees named in said Last Will and Testament substantial assets, far in excess of $15,000.00, which assets, together with certain real estate that passed directly, but conditionally, to said Trustees upon the death of testator, are now in the possession of and under the control of the plaintiff herein as sole remaining Trustee of said trust; that the plaintiff herein is now in a position to carry out the purposes of said trust and its obligations under said trust but is prevented from doing so because it cannot, with certainty and exactness, construe some of the language used by testator in his Last Will and Testament, and the First Codicil thereto, setting out the rights and duties of this plaintiff.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT II OF THE PETITION

1. The Court makes the following findings of fact as to Count II of the petition:

(a) That under the provisions of the public charitable trust above mentioned, this plaintiff, as Trustee, is required

to "appraise the properties of the trust immediately upon receiving the same," and is further required to transfer to the corpus of the trust out of income, from time to time, sufficient assets to restore the value of the corpus of the trust estate to an amount "equal to its original value as of the date said assets were received by and came into the hands of the Trustee."

(b) That said Trustees received title to and possession of the real estate owned by the said Homer McWilliams at his death, by operation of law at the death of the said Homer McWilliams, on December 21, 1965, subject, however, to the rights of the probate estate as provided by law; that said Trustees received a conditional title to the personal property owned by the said Homer McWilliams at his death, subject, however, to the rights of the probate estate, as provided by law, but did not receive actual possession thereof until it was distributed to it on various dates by the Executors of the Estate of the said Homer McWilliams.

(c) That the plaintiff herein cannot determine with certainty the exact meaning of the words "immediately upon receiving the same" and "at the time it was received by and came into the hands of the Trustees," or the dollar value of the assets received by it on said dates, since said Trustees received actual possession of part of said assets at different times and during different calendar years, and asks the Court to construe the meaning of said language.

(d) That the fair market value of the properties of the trust on December 21, 1965, was $8,485,891.22.

2. The Court makes the following conclusions of law as to Count II of the petition:

(a) That the original valuation of the corpus of the trust is required to be made by said Trustees as of the date of death of testator, December 21, 1965.

(b) That the fair market value of the properties of the trust on that date was $8,485,891.22.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff herein, as Trustee of the McWilliams Memorial Hospital Trust, shall establish as the original value of the properties of said trust the fair market value of said properties on December 21, 1965, to-wit, $8,485,891.22.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT III OF THE PETITION

1. The Court makes the following findings of fact as to Count III of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is required "at the end of each year," in case of loss or deterioration of the trust estate, to add to the corpus of said trust estate so much of the income accruing to said estate as will bring the corpus of the trust estate up to a value equal to its original value at the time it was received by and came into the hands of the Trustees.

(b) That the plaintiff herein cannot determine with accuracy the exact meaning of the words "at the end of each year" and asks this Court to construe said words and to determine their meaning.

2. The Court makes the following conclusion of law as to Count III of the petition:

(a) That it was the intent of said testator, as determined from the entire Will, that the words "at the end of each year" mean at the end of each calendar year.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee of said trust shall give to the words "at the end of each year" the meaning of "at the end of each calendar year."

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT IV OF THE PETITION

1. The Court makes the following findings of fact as to Count IV of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is authorized to distribute the income from the trust estate annually for the maintenance and support of a designated class of hospitals operated and maintained on a non-profit basis in the territory now constituting Jackson County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said hospitals born of white parents in the United States of America.

(b) That the plaintiff herein is unable to ascertain with certainty whether, under the law of Missouri, the words "and/or" are used in the conjunctive or disjunctive sense and are uncertain as to whether or not it may distribute all of the income of the trust estate exclusively to hospitals of the class described to the exclusion of distribution to patients of the class described, or vice versa, or whether such distributions must be made to both such hospitals and to such patients of the classes described in said Last Will and Testament, and asks this Court to construe said words and determine their meaning.

2. The Court makes the following conclusions of law as to Count IV of the petition:

(a) That it was the intent of said testator, as determined from the entire Will, that by the use of the words "and/or," this plaintiff was authorized to distribute all of the said income exclusively to hospitals of the class described, or to distribute all of said income exclusively to patients of the class described, or to make distributions to both such hospitals and to such patients of the classes described, all as the sole discretion of said Trustee shall indicate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the words "and/or," as used in said Last Will and Testament of the said Homer McWilliams and the First Codicil thereto, shall be used in the conjunctive sense and that the plaintiff herein, as Trustee, is authorized to distribute the income of said trust estate, as its sole discretion shall indicate, either exclusively to hospitals of the class described, or exclusively to patients of the class described, or it may divide such income between such hospitals or patients as its sole discretion shall direct.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT V

1. This Court makes the following findings of fact as to Count V of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is authorized and directed to distribute income from the trust estate to "Protestant Christian Hospitals" and to certain patients in said hospitals "born of white parents"; that it is unable to determine with certainty what hospitals and what patients therein qualify as lawful beneficiaries

of the trust and whether or not the method of selecting beneficiaries of the trust set out in the said Will is legal.

(b) That it was the intention of Homer McWilliams, as evidenced by his use of the words "Protestant Christian Hospitals" in describing the hospital beneficiaries of the McWilliams Memorial Hospital Trust in his Last Will and Testament and the First Codicil thereto, that only such hospitals as have a special relationship to and at least some measure of control by a Protestant Christian church, and patients in such hospitals born of white parents were to be selected by his Trustee as beneficiaries of said trust.

(c) That the class of beneficiaries described as Protestant Christian hospitals is not indefinite, and that hospitals of that class can be ascertained and identified.

(d) That the Baptist Memorial Hospital, Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all have a special relationship with and are at least partially controlled by a Protestant Christian church and are therefore qualified for selection by the Trustee as beneficiaries of the trust.

(e) That none of the other hospitals named as defendants therein have any special relationship to or control by a Protestant Christian church and are therefore not qualified for selection by the Trustee as a beneficiary of the trust.

(f) That the selection of beneficiaries of the trust according to the provisions of the Will of Homer McWilliams will not result in unlawful discrimination based on race or religion.

2. The Court makes the following conclusions of law as to Count V of the petition:

(a) That under the provisions of said public charitable trust above mentioned, the plaintiff herein, as Trustee, is authorized and directed to distribute income from the trust estate to "Protestant Christian Hospitals" and to certain patients in said hospitals "born of white parents";

(b) That the class of beneficiaries described as Protestant Christian hospitals is not indefinite, that hospitals of that class can be ascertained and identified; and that the words "Protestant Christian hospitals" mean such hospitals as have a special relationship to and at least some measure of control by a Protestant Christian church.

(c) That the Baptist Memorial Hospital, Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all have a special relationship with and are at least partially controlled by a Protestant Christian church and are therefore qualified for selection by the Trustee as beneficiaries of the trust.

(d) That none of the other hospitals named as defendants therein have any special relationship to or control by a Protestant Christian church and are therefore not qualified for selection by the Trustee as a beneficiary of the trust.

(e) That the selection of beneficiaries of the trust according to the provisions of the Will of Homer McWilliams will not result in unlawful discrimination based on race or religion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the words "Protestant Christian Hospital" as used in the Last Will and Testament of Homer McWilliams and the First Codicil thereto are construed to mean

those hospitals that have some special relationship to and at least partial control by a Protestant Christian church.

2. That the words "Protestant Christian" as used in said Will and Codicil thereto are not indefinite, and the class of hospitals intended can be determined.

3. That the selection of beneficiaries of the trust according to the provisions of said Will and Codicil thereto will not result in unlawful discrimination based on race or religion and is lawful.

4. That the Baptist Memorial Hospital, the Lutheran Home and Hospital, St. Luke's Hospital and the Independence Sanitarium all qualify as proper beneficiaries under the Will of Homer McWilliams and the First Codicil thereto, and none of the other defendant hospitals do so qualify.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AS TO COUNT VI

1. The Court makes the following findings of fact as to Count VI of the petition:

(a) That under the Last Will and Testament of Homer McWilliams and the First Codicil thereto, the plaintiff herein, as Trustee, is authorized to "lease, sell, invest, reinvest and otherwise deal with the property of the trust assets," but said powers are not spelled out with particularity, and this Trustee cannot determine its lawful powers with certainty.

(b) That it was the intent of the testator, as determined from the entire Will, that the plaintiff herein, as Trustee, should have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and

to invest or reinvest, from time to time, the assets of the estate in real estate, real estate mortgages, personal property, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

2. The Court makes the following conclusions of law as to Count VI of the petition:

(a) That it was the intent of the testator, as determined from the entire Will, that the plaintiff herein, as Trustee, should have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and to invest or reinvest, from time to time, the assets of the estate in real estate, real estate mortgages, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that The First National Bank of Kansas City, as Trustee, in dealing with the assets of the trust, shall have broad powers to retain, sell, lease, mortgage, hypothecate or otherwise dispose of or encumber, from time to time, any asset of the trust estate and to invest or reinvest, from time to time, the assets of the estate in real estate, real estate mortgages, personal property, stocks, bonds and other types of securities issued by private corporations or by governmental agencies.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the judgments herein entered on Counts II, III, IV, V and VI of said First Amended Petition, and each of them, are hereby specifically designated as final judgments for the purposes of appeal within the meaning of Section 512.020, Revised Statutes of Missouri, as provided in Rule 81.06.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Court retains supervisory control over the administration of the two trusts created by the Last Will and Testament and the First Codicil thereto of Homer McWilliams and orders and directs the Trustee to file herein an annual report, within 90 days after the close of each calendar year, setting out an accounting for each of said trusts for each such calendar year.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action shall be taxed against the plaintiff herein, to be paid out of the income of the Homer McWilliams Memorial Hospital Trust.

Dated this 10th day of October, 1973.

/s/ James C. Moore
Judge

A true copy

Attest:
Bruce R. Watkins, Circuit Clerk
By /s/ L. Umphery
D. C.

APPENDIX C

No. 58488

Circuit Court No. 726,091

IN THE
SUPREME COURT OF MISSOURI

January Session, 1975

The First National Bank of Kansas City,
Plaintiff-Respondent,

vs.

John C. Danforth et al.,
Defendants-Appellants,

St. Luke's Hospital of Kansas City, Missouri, et al.,
Defendants-Respondents.

Now at this day the Court having seen and fully considered the motion of appellant John C. Danforth, Attorney General of Missouri, for a rehearing or in the alternative to transfer the above-entitled cause to Court en Banc, doth order that said motion be, and the same is hereby overruled.

Now also at this day the Court having seen and fully considered the joint motion of Lakside Hospital Association, et al., for a rehearing or in the alternative to transfer this cause to Court en Banc, doth order that said motion be and the same is hereby overruled.

It is further ordered by the Court that the motion of Known and Unknown Heirs for a rehearing and application for a transfer of this cause to Court en Banc, doth order that said motion be, and the same is hereby overruled.

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete record entry of said Supreme Court, entered of record at the January Session thereof, 1975, and on the 10th day of February, 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 27th day of March, 1975.

/s/ Thomas F. Simon
Clerk

(Seal)